Supreme Court, U.S.
FILED
MAY 27 1993
OFFICE OF THE CLERK

No. 92-1292

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

v.

ACUFF-ROSE MUSIC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICI CURIAE HOME BOX OFFICE, COMEDY CENTRAL, FOX INC., MAD MAGAZINE, and NATIONAL BROADCASTING COMPANY, INC., IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

This brief is submitted on behalf of *amici curiae* Home Box Office ("HBO"), Comedy Partners, doing business as Comedy Central ("Comedy Central"), Fox Inc. ("Fox"), *Mad Magazine* ("*Mad*"), National Broadcast-

ing Company, Inc. ("NBC") (collectively *Amici*).[1] *Amici* individually own and license a vast and diverse array of copyrighted works. They also create and distribute works in which satire and parody of current events, culture, and copyrighted materials of others (including the others' works) plays a significant part.[2]

HBO provides premium television programming to over 23 million subscribing viewers throughout the United States. HBO telecasts feature length motion pictures licensed to HBO, as well as other television programs that are produced by or for HBO. Among the parodies telecast by HBO are a comic movie trailer for the fictitious film, "Raging Bullwinkle," which parodies the film "Raging Bull," and a parody of the "Crazy Eddie" television commercials entitled "Crazy Ollie" in which an actor portraying Oliver North uses flamboyant and outrageous tactics to sell weapons to a television audience.

Comedy Central is a basic cable television service that reaches approximately 28 million homes throughout the United States and offers comedy programming in various genres. Comedy Central received widespread acclaim for its comedic coverage of the 1992 presidential campaign that included parodies of candidates' public appearances and the presidential debates. Other examples of its parodies include "MTV: Give Me Back My Life," a parody of the music video channel and music videos in general, and sketches from NBC's "Saturday Night Live" parodying the McLaughlin Group and a Canon camera advertisement.

Fox, through its subsidiary Twentieth Century Fox Film Corporation produces and distributes feature length

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[1] Written consent of both parties has been filed with the Clerk of the Court, as required by Supreme Court Rule 37.

[2] *Amici* have lodged a videotape with the Court that contains selected examples of parody they have produced, distributed, and/or telecast.

motion pictures, including "Hot Shots! Part Deux," which mocks war movies and Hollywood's penchant for attempting to creatively name sequels to hit movies. Fox Broadcasting Company, another subsidiary of Fox, broadcasts television programming via its 140 network affiliates throughout the United States. One of those television programs, "Comic Strip Live," is a weekly standup comedy series that includes many parodies. Another Fox subsidiary, Twentieth Television, produces and distributes television programming, including "In Living Color," which frequently spoofs current events and popular culture, and "The Simpsons," which often includes satirical references to cultural icons.

Mad is a humor magazine published eight times a year by E.C. Publications, Inc. *Mad* regularly publishes parodies of popular movies and television programs, such as "A-lad-Dim" (parodying the Walt Disney movie "Aladdin") and "I Love Luny" (satirizing the "I Love Lucy" television series). In recent issues, *Mad* also has parodied the "Superman" comic book series, as well as the cover of *Sports Illustrated* magazine's celebrated annual swimsuit issue, entitled "Sports Titillated."

NBC, through its owned stations and more than two hundred affiliates, broadcasts television programming throughout the United States. NBC's independent production company, NBC Productions, produces original television programming and feature films, including "Saturday Night Live," "Late Night," and "The Tonight Show With Jay Leno." NBC also broadcasts programs created by outside producers, including series such as "Laugh-In" and "SCTV Network." These series routinely parody films, news and entertainment television programs, songs, and current events, such as political debates.

SUMMARY OF ARGUMENT

Parody is a unique art form that imitates and distorts existing creative works "to entertain, inform, or stir public consciousness." *Warner Bros. v. American Broadcasting Cos.*, 720 F.2d 231, 243 (2d Cir. 1983). Courts routinely recognize that parody is a form of expression that is protected by the First Amendment. When faced with copyright infringement claims against parodists, however, courts have slighted the First Amendment and thus have applied to parody a truncated version of the doctrine of fair use.

Application of the fair use doctrine to parody has often been erratic and confusing. The Sixth Circuit denied copyright protection for "Pretty Woman" because 2 Live Crew created it for a commercial purpose, but few parodies are *not* created for a commercial purpose. Other courts have restricted the amount of copyrighted material a parodist may safely use to the minimal amount necessary to "conjure up" the existing work, but such a standard allows courts to make subjective judgments based on their distaste for the perceived quality of the parody. As a result, protection for parody has been inconsistent, is unpredictable, and at times—as illustrated by this case—has improperly been denied altogether.

Amici urge the Court to recognize that legitimate parody is entitled to First Amendment protection and that the statutory fair use factors cannot be mechanically applied in the context of parody. The Court should articulate an objective standard that provides consistent protection for legitimate parody and tailors the fair use factors to serve the First Amendment and to assist in determining the legitimacy of a claimed parody.

ARGUMENT

I. THE NATURE OF PARODY OFTEN REQUIRES USE OF MATERIAL FROM AN EXISTING COPYRIGHTED WORK.

When addressing parody in the context of copyright infringement claims, some courts, including the court below, demonstrate a fundamental misunderstanding of the nature and purpose of this unique art form. Parody is commentary cloaked in humor that serves "a dual purpose: casting a critical eye on society's creators while at the same time contributing to that very pool of genius." Albin, *Beyond Fair Use: Putting Satire in Its Proper Place*, 33 UCLA L. Rev. 518 (1985). Parody entertains and represents an important—and constitutionally protected—means of communicating ideas.

"Parody, in its purest form, is the art of creating a new literary, musical, or other artistic work that both mimics and renders ludicrous the style and thought of an original." Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 Harv. L. Rev. 1395 (1984).[3] "Many of the finest political and religious satires are . . . parodies. They preserve the form of the original almost inviolate, and merely distort the content a little—usually making it franker and more realistic." G. Highet, *The Anatomy of Satire* 76 (1962). A parody may ridicule the existing work itself or it may use that work as a vehicle for lampooning the flaws of

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[3] Differing definitions of "parody" abound. *See, e.g., Rogers v. Koons*, 960 F.2d 301, 309-10 (2d Cir.) (defining parody as "when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression of the original"), *cert. denied*, 113 S. Ct. 365 (1992); *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 28 (1st Cir.) ("The Oxford English Dictionary defines parody as '[a] composition in which the characteristic turns of thought and phrase of an author are mimicked to appear ridiculous, especially by applying them to ludicrously inappropriate subjects.' "), *cert. denied*, 483 U.S. 1013 (1987).

society at large. For example, the British radical Henry Labouchere distorted his country's national anthem, not to critique the song but to criticize the prolific and profligate family of Queen Victoria:

> "Grandchildren not a few,
> With great-grandchildren too,
> She blest has been.
>
> We've been their sureties,
> Paid them gratuities,
> Pensions, annuities.
> God Save the Queen."

Id. at 77 (quoting H. Pearson, *Labby* (1936)).[4]

Labouchere's version of "God Save the Queen" illustrates how an artist creates a new work using portions of an existing work as a uniquely effective means of communicating ideas. Labouchere used a substantial amount of the British national anthem—including the music, the meter, the rhyme scheme, and the final line of verse—and created his own lyrics. The resulting original work expresses his critical message with special meaning and power through the humorous alteration of a familiar song that lauds the virtues of the British monarch and her subjects. Incorporating portions of the underlying work gave the parody more impact and made Labouchere's message more accessible than if he had merely expressed the same ideas directly.

In a similar vein, the Fox program "In Living Color" framed Bill Clinton's arrival in the White House in the context of the theme song and characters from the television series, "The Beverly Hillbillies":

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[4] "God Save the Queen" also was altered in this country into the song, "My Country 'Tis of Thee." While the American revision may not have been originally intended as "humorous," it became a parody of the British national anthem by heralding liberty, the antithesis of monarchy.

> Come and listen to a story 'bout a man named Bill,
> Hick razorback with a destiny to fill;
> But 20 years before he would take the oath and creed,
> He dodged Vietnam, and he toked a little weed.
> Reefer, that is. Mary Jane. Didn't inhale.
>
> Well, the next thing you know Bill's the head of Arkansas,
> Fiddling with the budget and a honey from Hee Haw;
> We said, "Hey, Bill you should be the chief exec!"
> So we balanced off the ticket with another redneck.
> Gore, that is. Senator, Tennessee.
>
> The Capitol Hillbillies!

Again, the parody did not target the song itself, but used the theme represented by this song—a poor, uneducated man becomes wealthy and important overnight—to satirize Clinton's rise to national prominence despite problems in his past.

Parodies, of course, are not limited to music[5] but can be created from any form of expression, including works of literature,[6] drama,[7] opera,[8] motion pictures,[9] televi-

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[5] For other examples of music parody in addition to the case before this Court, see, *e.g.*, *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) (discussing parody of Johnny Mathis song, "When Sunny Gets Blue" created by altering lyrics to "When Sonny Sniffs Glue"); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.) (evaluating *Mad*'s "parody lyrics to 57 old standards," including transforming "A Pretty Girl is Like a Melody" into "Louella Schwartz Describes Her Malady"), *cert. denied*, 379 U.S. 822 (1964). Contemporary music parodists also include Peter Schickele (better known as P.D.Q. Bach) and Tom Lehrer.

[6] *See, e.g.*, G. Highet, *The Anatomy of Satire* at 67-147 (discussing numerous examples of literary parody, including James Joyce's "Ulysses," as a parody of Homer's "Odyssey").

[7] *See, e.g., id.* at 120-24 (discussing parodies of drama, including Shakespeare's "Troilus and Cressida" as a parody of episodes of the "Iliad").

[8] *See, e.g., id.* at 124-28 (discussing satire and parody in the works of Jaques Offenbach and Gilbert and Sullivan, whose work also has been parodied).

[9] *See, e.g., Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955) (Sid Caesar parody of film,

sion,[10] periodicals,[11] advertisements,[12] and fine art.[13] Acclaimed playwright Tom Stoppard often uses parody in his works, including "Travesties" (parodying Oscar Wilde's "The Importance of Being Ernest") and "Rosencrantz and Guildenstern Are Dead" (parodying "Hamlet"). Television and film, as virtually universal forms of communication, are particularly fertile areas for parodists, providing both creative works to parody and a medium for creation of parody. Parody of such works has played—and continues to play— a pivotal role in television series from "Laugh-In" and "Monty Python's Flying Circus" to "Saturday Night Live" and "In Living Color."

"From Here to Eternity" entitled "From Here to Obscurity"). *Mad* regularly parodies current films. Motion picture parodies of other films include "Airplane!," which parodied the "Airport" films, and the recent "Loaded Weapon," parodying the "Lethal Weapon" movies.

[10] *See, e.g., Warner Bros. Inc. v. American Broadcasting Cos.*, 720 F.2d 231 (2d Cir. 1983) (parody of "Superman" character and television series by television show "The Greatest American Hero"). The television series "Soap," was a parody of daytime television dramas, as was the motion picture "Tootsie."

[11] *National Lampoon* magazine uses parodies extensively and has devoted entire issues to parodying another magazine. One example was a parody version of *Sports Illustrated* (which *Mad* has also parodied) with articles such as "Dog Fishing in America."

[12] *See, e.g., Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440 (N.D. Ill. 1991) (parody of Eveready battery commercials featuring the "Energizer bunny"). The Fox film "Hot Shots! Part Deux" also parodies the "Energizer bunny." The "Saturday Night Live" episodes telecast by Comedy Central often parody television commercials, including a sales pitch for "Bass-O-Matic" as a take-off on "Veg-O-Matic."

[13] For example, Leonardo Da Vinci's masterpiece, "The Last Supper" has often been parodied, including a scene in the film, "M*A*S*H," in which a suicidal army dentist's comrades have a "last supper" for him and the characters assume the positions in the famous painting.

HBO is currently telecasting a program entitled "Hearts of Hot Shots! Part Deux—A Filmmaker's Apology," about the making of the new Fox film, "Hot Shots! Part Deux." The HBO program previews the film but also parodies "Hearts of Darkness: A Filmmaker's Apocalypse," a feature about the making of Francis Ford Coppola's "Apocalypse Now." "Hearts of Hot Shots!" tracks the form and content of "Hearts of Darkness," using and altering many scenes to poke fun at its more somber precursor. The program uses humor not only to describe the film but also as a uniquely powerful way of commenting on what the program perceives as the overblown self-importance of "Hearts of Darkness."

The Fox television series "Comic Strip Live" telecast a parody of the Fox movie "Home Alone" entitled "Nursing Home Alone," which replaced the movie's overlooked yet resourceful child hero with a feisty nursing home resident. The parody not only lampooned the film, but was a criticism of society's treatment of the elderly. Comedy Central telecast an advertising parody originally produced and aired by NBC on "Saturday Night Live" targeting the commercial for the Canon AE-1 camera and its slogan, "So advanced, it's simple." The parody had the same "look" as the commercial, but used comedian Eddie Murphy playing the blind Stevie Wonder as the photographer to demonstrate that the camera was not that simple—and that we can laugh *with* the handicapped without laughing *at* them.

As these examples illustrate, parodies express a variety of ideas. Parody can have as grand an object as exposing the foibles of humanity,[14] or as narrow a vision as

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[14] *See, e.g., Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.) (finding no infringement in *Mad*'s publication of "a collection of parody lyrics to 57 old standards *which reflect the idiotic world we live in today*") (emphasis added), *cert. denied*, 379 U.S. 822 (1964).

simply rendering an original work ridiculous.[15] The nature of parody, however, is to comment or criticize through the humorous use and alteration of material taken from an existing work. A parodist thus exercises First Amendment rights through the productive use of material—often copyrighted material—created by another artist. *Cf. Harper & Row v. Nation Enters.*, 471 U.S. 539 (1985) (finding reproductive, as opposed to productive, use was not fair use or protected by First Amendment).

II. PARODY IS A FORM OF EXPRESSION ENTITLED TO FIRST AMENDMENT PROTECTION.

Protection of parody, like no other issue of copyright law, illustrates that "views of copyright and the First Amendment, held 'side by side,' may, in fact, be contradictory." 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 1.10[A], at 1-62 (1992). Parody by its nature frequently requires the use of copyrighted material. By incorporating material from a copyrighted work, parodies arguably fall within the statutory definition of a "derivative work," which the holder of a valid copyright generally has the exclusive right to create.[16] At least as applied to parody, however, monopoly rights in expression are at odds with the freedom of expression guaranteed by the First Amendment.[17]

To date, copyright claims against parodists have largely escaped First Amendment scrutiny. Courts have recognized in other contexts, however, that satire and

[15] *See, e.g., Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) (altering lyrics of song, "When Sunny Gets Blue" to "When Sonny Sniffs Glue").

[16] *See* 17 U.S.C. §§ 101 & 106 (1988) (defining "derivative work" and granting copyright holders exclusive rights to create or authorize creation of such works).

[17] "The language of the First Amendment does not limit its protection to speech which is original with the speaker but rather states that Congress shall make 'no law' abridging freedom of speech." 1 M. Nimmer & D. Nimmer, *supra*, at 1-63.

parody are forms of expression protected by the First Amendment. In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), this Court held that the First Amendment precluded the Reverend Jerry Falwell from recovering damages for emotional distress arising out of *Hustler's* offensive parody of him (which in turn was contained within a parody of an advertising campaign). The Court observed that "[d]espite their sometimes caustic nature, . . . graphic depictions and satirical cartoons have played a prominent role in public and political debate." *Id.* at 54.[18] While acknowledging that the parody of Falwell was "at best a distant cousin of the political cartoons described above," the Court found no "principled standard to separate the one from the other" under the First Amendment. *Id.* at 55.[19]

In a related context, the First Circuit employed the First Amendment to insulate trademark parodists from liability under state anti-dilution statutes in *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir.), *cert. denied*, 483 U.S. 1013 (1987). The court expressly recognized that "[d]enying parodists the opportunity to poke fun at symbols and names which have become woven into the fabric of our daily life, would constitute

[18] The Court also found that distinctive presidential features "have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them." *Id.* at 55.

[19] *See also White v. Samsung Electronics America*, 989 F.2d 1512, —— (9th Cir. 1993) (1993 WL 73915) (Kozinski, J., dissenting from order rejecting suggestion for rehearing en banc) ("Parody, humor, irreverence are all vital components of the marketplace of ideas. The last thing we need, the last thing the First Amendment will tolerate, is a law that lets public figures keep people from mocking them . . . ."); *Pring v. Penthouse Int'l Ltd.*, 695 F.2d 438 (10th Cir. 1982) (First Amendment protected sexually explicit parody of Miss America beauty contest in defamation action), *cert. denied*, 462 U.S. 1132 (1983).

a serious curtailment of a protected form of expression." *Id.* at 34.[20]

Well-known copyrighted works are just as "woven into the fabric of our daily lives" as famous trademarks, and parodies of such works can play as "prominent a role in public and political debate" as a personal lampoon; yet no court has expressly applied the First Amendment to parodies of copyrighted works.[21] Most courts evaluating

[20] The court also observed,

> The central role which trademarks occupy in public discourse (a role eagerly encouraged by trademark owners), makes them a natural target of parodists. Trademark parodies, even when offensive, do convey a message. The message may be simply that business and product images need not always be taken too seriously; a trademark parody reminds us that we are free to laugh at the images and associations linked with the mark. The message also may be a simple form of entertainment conveyed by juxtaposing the irreverent representation of the trademark with the idealized image created by the mark's owner. While such a message lacks explicit political content, that is no reason to afford it less protection under the first amendment.

Id. (citations omitted); *see Cliffs Notes v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490, 493 (2d Cir. 1989) (protecting parody from liability for trademark infringement after observing that "parody is a form of artistic expression, protected by the First Amendment"); *see generally*, Note, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 U. Va. L. Rev. 1079 (1986).

[21] *But see Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875 (S.D. Fla. 1978) (finding no fair use of copyrighted *TV Guide* magazine cover but use was protected by First Amendment), *aff'd on other grounds*, 626 F.2d 1171 (5th Cir. 1980) (finding fair use and not reaching First Amendment issue). Some courts also have noted in copyright cases "the broad scope permitted parody in First Amendment law," *Groucho Marx Prods. v. Day and Night Co.*, 689 F.2d 317, 319 n.2 (2d Cir. 1982), and have stressed without reference to the First Amendment that "satire and parody are deserving of substantial freedom— both as entertainment and as a form of social and literary criticism." *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545

claims of copyright infringement never mention the First Amendment, or simply reject out of hand any constitutional arguments proffered by the parodist.[22] Current doctrine, therefore, recognizes an artist's First Amendment right to parody public individuals or prominent symbols and names, but does not address whether that artist can parody an individual's or business' copyrighted works. No reasoned basis exists for such an anomaly in the protection of parody.

III. THE FAIR USE DOCTRINE AS CURRENTLY INTERPRETED PROVIDES UNCERTAIN PROTECTION FOR PARODY.

Without attention to the First Amendment, courts have sought to employ the doctrine of "fair use," codified at 17 U.S.C. § 107, to determine the extent to which parodies should be protected from claims of copyright infringement—often with inconsistent and unpredictable results.[23] Indeed, some courts have stated that "the fair

(2d Cir.), *cert. denied*, 379 U.S. 822 (1964); *see Fisher v. Dees*, 794 F.2d 432, 437-38 (9th Cir. 1986) ("parodies play an important role in social and literary criticism and thus merit protection even though they may discourage or discredit an original author").

[22] *See, e.g., Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758-59 (9th Cir. 1978) (summarily rejecting First Amendment defense because free speech rights exist only in uncopyrightable ideas as opposed to the copyrighted expression of those ideas), *cert. denied*, 439 U.S. 1132 (1979). In this case, the courts below simply ignored the First Amendment. This Court has addressed the First Amendment's impact on copyrights only in the context of a claimed right to disseminate newsworthy information *earlier* than the copyright holder could publish it. *Harper & Row*, 471 U.S. at 555-60. Parody, by contrast, would not exist *at all* but for its ability to use copyrighted material.

[23] The statutory fair use factors as currently applied to parody may not be equipped to deal with First Amendment concerns. As one commentator observed,

> By engendering an inappropriate substantiality test, by unduly emphasizing commercial motivations, and by disregarding

use doctrine encompasses all claims of first amendment in the copyright field." *New Era Publications Int'l v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). Such a belief is particularly troubling because many courts—including the Sixth Circuit in this case—appear to view the statutory fair use factors as the exclusive method of parody analysis. If not informed by the unique nature of parody and its value under the First Amendment, however, the four fair use factors enumerated in the Copyright Act can be misconstrued to deny the proper level of protection.[24]

A. Limiting Fair Use to Noncommercial Uses Precludes Protection for Much Legitimate Parody.

The first statutory fair use factor variously construed in parody cases is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). The difficulties with application of this factor may arise from this Court's statement in a non-parody context that commercial use creates a presumption of harm to the copyright holder. *Sony Corp. v. Universal*

> the historic role of parody as entertainment and criticism, the fair use test has placed the parodist in doubt as to the extent of his right to publish his works and has thus inhibited the free exercise of an ancient and valuable art.

Goetsch, *Parody as Free Speech—The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 W. New Eng. L. Rev. 39, 57 (1980).

[24] Courts, in the name of applying fair use factors, can limit protection according to their assessment of a particular parody's content. Some courts have taken advantage of this flexibility to reject a fair use defense for parodies they find in questionable taste. *See, e.g., MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981) (disallowing parody defense to alleged infringement of song "Boogie Woogie Bugle Boy of Company B" by song "Cunnilingus Champion of Company C"); *Air Pirates*, 581 F.2d 751 (disallowing parody defense to comic book using Disney characters engaging in drug use and sexual activity).

City Studios, Inc., 464 U.S. 417, 451 (1984). But the Court has further explained that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row*, 471 U.S. at 562.[25]

In any event, this factor should not be mechanically applied to distinguish fair from unfair use in parody. Indeed, most—if not all—of the reported parody cases accepting the fair use defense involved commercially produced parodies.[26] Those courts recognized "that many parodies distributed commercially may be 'more in the nature of an editorial or social commentary than . . . an attempt to capitalize financially on the [copyrighted] work.'" *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) (quoting *Pillsbury Co. v. Milky Way Prods.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981)).

"Exploitation of the copyrighted material without paying the customary price" also has little meaning in the context of parody. No "customary price" exists for the right to parody a copyrighted work,[27] nor should such a price be imposed.[28] More fundamentally, *amici* share

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[25] Even as so formulated, this standard would provide more protection for commercially produced parody than that accorded by the Sixth Circuit's single-minded focus on the "commerciality" of 2 Live Crew's parody. As applied to parody, the inquiry would center on whether the use improperly "exploited" the copyrighted material, regardless of whether the parodist had a profit motive.

[26] *See, e.g., Fisher*, 794 F.2d 432 (parody contained in commercial comedy album); *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980) (per curiam) (television parody of "I Love New York" promotional campaign); *Berlin*, 329 F.2d 541 (*Mad* parodies of popular songs).

[27] "The parody defense to copyright exists precisely to make possible a use that generally cannot be bought." *Fisher*, 794 F.2d at 437.

[28] If a popular work is the subject of a parody, the parody also may be popular. Such popularity—and its attendant financial suc-

the uneasiness of Judge Nelson in his dissent below "about the prospect of the courts turning copyright holders into censors of parody." Petition for Certiorari, Appendix ("App.") A at 33a. A license requirement for parody would enable copyright holders to stifle criticism of, or comment on, their work and the societal themes of which it is a part, thus severely limiting discussion in the marketplace of ideas protected by the First Amendment.

The Sixth Circuit's decision below is the most glaring example of misapplication of the "commerciality" factor to parody. Taking the language of *Sony*, the Sixth Circuit began its fair use inquiry "from the position that the use is unfair." *Id.* at 13a. Although it ostensibly examined the remaining statutory fair use factors, in its final analysis the court relied entirely on this single factor:

> In dealing with uses popularly termed parodies, the factors involving the commercial nature of the use and the damage to the defendant are of particular significance. It is likely, for example, that an identical use of the copyrighted work in this case at a private gathering on a not-for-profit basis would be a fair use. *It is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use.*

Id. at 17a-18a (emphasis added). Because, like most creative works in our society, virtually all parodies are created for a "commercial" purpose, the Sixth Circuit's approach to this factor would effectively eviscerate fair use protection for parodies.

B. The Fictional or Factual Nature of the Copyrighted Work Should Not Affect Fair Use Protection for Parody.

The statutory fair use factor assessing "the nature of the copyrighted work," 17 U.S.C. § 107(2), has not

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cess—should not be considered an "exploitation" of material from the copyrighted work as long as the parody is a creative criticism or comment. *See* discussion *infra* at 24-25.

been the focus of any court's decision concerning whether a parodist's use of material from a copyrighted work was fair use. When mentioned, however, this factor nevertheless has been found to militate against a finding of fair use for parody. In other contexts, the nature of the copyrighted work affects whether a use is fair because "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy." *Harper & Row*, 471 U.S. at 563. Fact and fiction, however, are equally susceptible to parody, and neither should receive an exemption. As Judge Nelson pointed out below in his dissent, "parody routinely sets its sights on the fictive as opposed to the factual," and it makes "no sense at all to penalize the parodist for taking as his subject precisely the sort of work that has been grist for the parodists' mill for the last two and a half millennia." App. A at 28a.[29]

C. A Parodist Should Not Be Limited to Copying Only the Essential Minimum Necessary to "Conjure Up" the Existing Work.

The most widely used statutory fair use factor is "the amount and substantiality of the portion [of the copyrighted work] used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). Parodies of motion pictures illustrate courts' difficulties in applying this factor. In an early and celebrated copyright infringement case, Comedian Jack Benny created a television parody of the motion picture "Gaslight," and the copyright holder of the film sued for infringement. Mechanically reciting the intended similarity of locale, plot developments, characters, and dialog between the two works, both the district

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[29] *See* Albin, *Beyond Fair Use: Putting Satire in Its Proper Place*, 33 UCLA L. Rev. 518, 545 (1985) ("there is no reason to protect any work from parody"); *see generally* G. Highet, *The Anatomy of Satire* 67-147 (1962) (analyzing parodies over the centuries, all of which were parodies of literature, drama, music, and poetry, rather than of factual material).

court and the Ninth Circuit Court of Appeals concluded that Benny's use of material was an infringement: "[P]arodized or burlesque taking is to be treated no differently from any other appropriation; . . . if it is determined that there was a substantial taking, infringement exists." *Loew's Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165, 182 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by equally divided Court*, 356 U.S. 43 (1958).

Several months later, the same district court was presented with a virtually identical case in which comedian Sid Caesar parodied the film "From Here to Eternity" on his television program "Your Show of Shows," but in this case the court found no infringement:

> Since a burlesquer must make a sufficient use of the original to *recall or conjure up* the subject matter being burlesqued, the law permits more extensive use of the protectible portion of a copyrighted work in the creation of a burlesque of that work in the creation of other fictional or dramatic works not intended as a burlesque of the original.

Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348, 354 (S.D. Cal. 1955) (emphasis added). Caesar's use of material from "From Here to Eternity" was almost the same as Benny's use of "Gaslight," yet the court justified its disparate decisions with the generalized determination that Benny's use was "substantial," while Caesar's was not.

These cases continue to raise doubts about the extent to which a parodist may use material from a copyrighted work. The district court's "recall or conjure up" standard, moreover, has been used by the Ninth Circuit to set a ceiling on the amount of material a parodist may use from a copyrighted work:

> when persons are parodying a copyrighted work, the constraints of the existing precedents do not permit them to take as much of a component part as they need to make the "best parody." Instead, their desire to make the "best parody" is balanced against the rights of the copyright owner in his original expression. That balance has been struck at giving the parodist what is necessary to conjure up the original. . . .

Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).[30]

The Second Circuit, on the other hand, has interpreted "recall or conjure up" as it was originally used by the California district court—"not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point." *Elsmere Music, Inc. v. National Boradcasting Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980) (per curiam). In light of the conflict on this issue, a parodist may feel obliged to avoid creating the "best parody" and may attempt to use no more of the copyrighted work than is necessary to "conjure up" or "place firmly in the reader's mind the parodied work and those specific attributes that are to be satirized." *Air Pirates*, 581 F.2d at 758.

D. A Parody's Adverse Effect on the Value of a Copyrighted Work Is the Natural Product of Comedy and Criticism.

The final fair use factor misconstrued by some courts in the context of parody is "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). In a non-parody context, this Court has identified the effect on the market for the original as the most important factor in fair use analysis.

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[30] *But see Fisher*, 794 F.2d at 439 (arguably softening the decision in *Air Pirates* by stating that "[w]e did not set a fixed limit on copying, but merely expressed our judgment that that particular parody could easily have been accomplished through more restricted means").

Harper & Row, 471 U.S. at 566. Coupled with the presumption of harm from commercial uses announced in *Sony*, this factor can become a potent weapon against parody, particularly when misapplied to works of implied or direct criticism.

The Sixth Circuit's decision below again provides a clear example of abuse of this factor. In evaluating the effect on the potential market, the court held, "[t]he focus is on *potential* harm, and the 'inquiry must take account not only of harm to the original but also of harm to the market for derivative works.'" App. A at 16a (quoting *Harper & Row*, 471 U.S. at 568) (emphasis in original). The court presumed harm because of the commercial purpose of the parody, despite the district court's finding that the parody would not adversely affect the market for the original work. The court then concluded that this factor did not support a finding of fair use. *Id.* at 17a.

Such a virtually irrebuttable presumption of harm precludes fair use protection of parody. By its nature true parody often *intends* to "wound[] the original (however slightly), pointing out faults, revealing hidden affections, emphasizing weaknesses and diminishing strengths." G. Highet, *The Anatomy of Satire* 68 (1962). Any resulting harm to the original is likely to be the result of this ridicule, not an unfair use of copyrighted material. Compensation for losses attributable to criticism has never been—and should not be—a legitimate concern of copyright law.[31] As one commentator succinctly observed, moreover,

> If the satire is essentially a humorous criticism of another work, it seems quite unlikely that anyone would decide *not* to buy the original and instead buy the satire. Without the original, the satire is not funny! In fact, if the parody is quite popular, it may spur many people to buy the original, thereby *increasing* the demand for it.

Albin, *Beyond Fair Use: Putting Satire in Its Proper Place*, 33 UCLA L. Rev. 518, 545 (1985) (emphasis in original).

Courts more sensitive to the nature and purpose of parody accordingly have focused their inquiry on whether the parody "fulfills the demand for the original." *Fisher*, 794 F.2d at 438.[32] According to these courts, a finding that the parody at issue would not fulfill demand for the original—as should be true of all legitimate parodies—supports a finding that the parody's use of the copyrighted material was fair. The presumption of harm imposed by the Sixth Circuit thus substantially conflicts with much prior case law and would prevent a finding of fair use of copyrighted material in the vast majority of parodies.

IV. FAIR USE PROTECTION FOR PARODY REQUIRES CONSIDERATION OF FIRST AMENDMENT CONCERNS.

As copyright owners themselves, *amici* are keenly aware of the importance of copyright protection. In order to protect the First Amendment rights of parodists, however, copyright law should be tailored to accomplish its intended purpose, *i.e.*, promoting creative achievement—a purpose that is also served by fostering original and creative parodies. The focus of the fair use test when applied to parody thus should be to assess the legitimacy of a claimed parody, not merely to recite the statutory factors.

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[31] Such "injuries," moreover, have always been the price paid for exercise of First Amendment freedom. *E.g.*, *Falwell*, 485 U.S. at 50-56.

[32] *Accord, e.g.*, *Berlin*, 329 F.2d at 545; *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 747 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (per curiam).

A. Protection for Parody Must Ensure the Preservation of First Amendment Values Without Infringing the Interests of Copyright Owners.

Without this Court's guidance on the meaning and purpose of parody, the lower courts will continue to apply the fair use factors in an erratic and unpredictable manner. A parody may criticize the work from which it uses material, or it may use that material to comment on societal themes of which the existing work is a part.[33] A parody may focus on part of a particular work, or it may target the work as a whole; it may directly criticize the copyrighted work by making it laughable, or it may build more subtly on the work to convey indirectly a comment that could not be expressed head on. As the Second Circuit and others have emphasized, however, a parody must add some original element of comment or criticism to be worthy of protection, not simply reproduce an existing work.[34] The originality of the parody comes from "using the [existing work] as a known element of modern culture and contributing something new for humorous effect or commentary." *Elsmere Music*, 623 F.2d at 253 n.1.

This Court should find, therefore, that a protected parody is an original artistic work that incorporates portions of the ideas and expressions of a recognizable, previously published work, altering or building on that previous work as a means of expressing criticism or comment on that work or on societal themes of which that work is a part. Such protection for parody minimizes the impact on the rights of copyright owners while extending to parodists their expressive rights under the First Amendment.

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[33] *See Berlin*, 329 F.2d 541 (protecting *Mad* parodies to be sung to the tune of popular songs, not all of which were direct targets of the parodies).

[34] *See, e.g., Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397, 1398 (S.D.N.Y. 1975) (use of entire copyrighted song as background music to an orgy "did not parody the Mickey Mouse March but sought only to improperly use the copyrighted material").

Copyrights, of course, also have their source in the Constitution, which authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings." U.S. Const. art. I, § 8, cl. 8. Economic incentives are granted to authors, however, "to promote the progress of science and useful arts":

> "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."

Sony, 464 U.S. at 431-32 (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).[35]

Protection for parody might, in theory, deny creators a full economic benefit of their works because they would not be able to exact a fee for parody licenses, but in reality, no such market is workable:

> Parodists will seldom get permission from those whose works are parodied. Self-esteem is seldom

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[35] As the Second Circuit has also observed,

> It is a fundamental objective of the copyright law to foster creativity. However, that law has the capacity both to augment and diminish the prospects for creativity. By assuring the author of an original work the exclusive benefits of whatever commercial success his or her work enjoys, the law obviously promotes creativity. At the same time, it can deter the creation of new works if authors are fearful that their creations will too readily be found to be substantially similar to preexisting works.

Warner Bros. v. American Broadcasting Cos., 720 F.2d 231, 240 (2d Cir. 1983).

> strong enough to permit granting of permission even in exchange for a reasonable fee. The parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought.

Fisher, 794 F.2d at 437 (citation omitted); *accord* Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. Colo. L. Rev. 79, 90 (1991) ("As an initial matter, parodists who inquire about the availability of parody rights generally meet the reply that the rights are simply not for sale. Furthermore, authors who sue parodists often seem as concerned with stopping unflattering references to their work as they are with any financial loss.") (footnote omitted).[36]

In any event, the absence of a market for parody licensing should not deter artists from future creation.

> After all, any work of sufficient notoriety to be the object of parody has already secured for its proprietor considerable financial benefit. According that proprietor further protection against parody does little to promote creativity, but it places a substantial inhibition upon the creativity of authors adept at using parody to entertain, inform, or stir public consciousness.

Warner Bros. v. American Broadcasting Cos., 720 F.2d 231, 242-43 (2d Cir. 1983). Creators can reasonably anticipate revenues from licensing a film adaptation of their novel, for example, or from granting permission for use of their song in a movie soundtrack. But they should have no reasonable anticipation of licensing their works to critics—be they reviewers or parodists—and thus will not be discouraged from creating works by the absence of a market for parody rights. Establishing such a market also would raise serious First Amendment concerns, and would be tantamount to requiring a speaker to obtain permission to criticize a public individual or institution.

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[36] The defendant in *Fisher* sought and was denied permission to use the copyrighted song for his parody. 794 F.2d at 437. 2 Live Crew also sought, and not surprisingly was refused, permission to parody "Oh Pretty Woman."

"Parody that qualifies as an original work represents an expansion of artistic creation, which is exactly what copyright[] law seeks to protect." Abramson, *How Much Copying Under Copyright? Contradictions, Paradoxes, Inconsistencies*, 61 Temple L. Rev. 133, 170 n.307 (1988); *see Warner Bros.*, 720 F.2d at 242 ("It is decidedly in the interests of creativity, not piracy, to permit authors to take well-known phrases and fragments from copyrighted works and add their own contributions of commentary or humor."). Protecting parody as *amici* respectfully propose would further the goals of both copyright and free expression.

B. The Statutory Fair Use Factors Are Not Exclusive But Should Assist in Measuring the Legitimacy of a Claimed Parody.

The fair use doctrine can accommodate First Amendment and other interests in parody. Indeed, Congress expressly identified parody as a fair use in the 1976 amendment codifying the doctrine, and Congress never intended that the four statutory factors be the exclusive means of assessing fair use in all circumstances: "Beyond a very broad statutory explanation of what fair use is and *some* of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5680 (emphasis added).[37] When used to assess the legitimacy of a claimed parody, the statutory factors can become an important means of assuring protection for both parodists and copyright owners.

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[37] *See id.* at 5678 (listing "use in a parody of some of the content of the work parodied" as a fair use).

1. *Purpose and Character of the Use.*

Analysis under the first statutory fair use factor, "the purpose and character of the use," should focus on whether the claimed parody has altered or built on material incorporated from an underlying copyrighted work as a vehicle for criticism or comment. The "commercial" or "noncommercial" purpose of the parodist in creating the parody should not determine whether a particular work is a parody subject to fair use protection.

In the case before the Court, 2 Live Crew's "Pretty Woman" is an original work that incorporates portions of Acuff-Rose's "Oh Pretty Woman," humorously altering the music, lyrics, and style of that work as a means of criticism or comment. As the district court concluded, "Acuff-Rose may not like it, and 2 Live Crew may not have created the best parody of the original, but nevertheless the facts convincingly demonstrate that it is a parody." App. B at 42a. The Sixth Circuit accepted this conclusion.[38] App. A at 10a. That is all that should be required under this factor.

2. *Nature of the Copyrighted Work.*

The "nature of the copyrighted work" generally should not affect the analysis except to require that only material from a recognizable, previously published work may be used in a parody. The nature of parody is to criticize or comment using material from a *familiar* work,

[38] The Sixth Circuit's reluctance in accepting the district court's conclusion stemmed from the circuit court's overly restrictive view that it is "direct comment, comment which is expressly and unambiguously directed at the message of the original work, which constitutes parody," and "even accepting that 'Pretty Woman' is a comment on the banality of white-centered popular music, we cannot discern any parody of the original song." App. A at 11a n.8. The Sixth Circuit nevertheless found that this factor weighed against a finding of fair use because of 2 Live Crew's commercial purpose in creating the parody.

not a work that has yet to be published or widely distributed. *Cf. Harper & Row*, 471 U.S. 539 (analyzing fair use of unpublished material in non-parody context). "Oh Pretty Woman" has been published and is among the most recognizable songs in its genre. That should satisfy this factor. That "Oh Pretty Woman" is a "creative work" as opposed to a work of fact has no impact on whether "Pretty Woman" is a legitimate parody.[39]

3. *Amount and Substantiality of the Portion Used.*

The "amount and substantiality" factor has greater relevance to the legitimacy of a parody, but the inquiry should be limited to whether the challenged work is "original," *i.e.*, has made a productive use of the copyrighted material, as opposed to simply reproducing that material with little or no attempt to alter or build on it. As interpreted by the Ninth Circuit, the "recall or conjure up" test is too restrictive. Parodists should be permitted to create the "best parody," even if they use more material than is sufficient only to "recall or conjure up" the existing work.

The inquiry under this factor accordingly should focus on *how* the copyrighted material is used in the parody. To be eligible for fair use protection, all copyrighted material taken from an existing work and used in a parody of that work must be the object or part of the object of the parody's comment or criticism. On the other hand, if the existing work is not parodied directly but is utilized as a vehicle for satirizing broader societal themes, the copyrighted material taken from it must be used as an effective part of the parody, *i.e.*, it must contribute in a meaningful way to the comment or criticism intended

[39] *See* Albin, *Beyond Fair Use: Putting Satire in Its Proper Place*, 33 UCLA L. Rev. 518, 545 (1985) ("The 'nature of the copyrighted work' is ignored, as it should be, since there is no reason to protect any work from parody.").

by the parody.[40] This will ensure that copyrighted material is not gratuitously included in the parody simply to capitalize on the success of the existing work. *See Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir.) (finding that copyrighted material "was copied nearly *in toto*, much more than would have been necessary even if the sculpture had been a parody of plaintiff's work"), *cert. denied*, 113 S. Ct. 365 (1992).[41]

Here, the district court found that 2 Live Crew's work "appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose." App. B at 47a. "Pretty Woman" thus made a creative, as opposed to simply a reproductive, use of "Oh Pretty Woman." The Sixth Circuit incorrectly found that this factor did not support a finding of fair use because the court "conclude[d] that taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original." App. A at 16a. 2 Live Crew produced a work in which copyrighted material was used only to comment on the existing work and the type of music it represents—a use that should satisfy this factor.

[40] This standard is a more detailed articulation of the Second Circuit's recognition that extensive use of copyrighted material is a fair use "provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary." *Elsmere Music*, 623 F.2d at 253 n.1.

[41] Such a standard also would eliminate some courts' curious notion that music parodies are somehow entitled to use more of the copyrighted work to "conjure up" the existing work than are other types of parodies. *See, e.g., Fisher*, 794 F.2d at 439 (song parody has a " 'special need for accuracy,' providing some license for 'closer' parody") (quoting *Air Pirates*, 581 F.2d at 758). As 2 Live Crew's parody illustrates, however, some song parodies may use less of the original work than others. Regardless of the art form parodied, "short of . . . near-verbatim identity of content, the disparity of function between a serious work, and a satire based on it, will sometimes justify the defense of fair use even where substantial similarity exists." 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.05[C], at 13-102.28(18)-(19) (1992) (footnote omitted).

4. *Effect on the Market.*

When properly interpreted, the "effect of the use upon the potential market for or value of the copyrighted work" remains a vital factor in assessing the legitimacy of a parody. The inquiry under this factor is whether the claimed parody "fulfills the demand" for the existing work. "A court should thus require the plaintiff to demonstrate potential or actual commercial substitution of the parody for the original." Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 Harv. L. Rev. 1395, 1409-10 (1984).

Acuff-Rose has not demonstrated that "Pretty Woman" fulfills the demand for "Oh Pretty Woman." The district court found that "it is extremely unlikely that 2 Live Crew's song could adversely affect the market for the original. The intended audience for the two songs is entirely different." App. B at 49a. The Sixth Circuit did not disagree but relied on a presumption of harm resulting from a commercial use. *Id.* at 16a-17a. No such presumption is appropriate for parody. The district court's inquiry was the proper one, and its conclusion paralleled the Ninth Circuit's decision in similar circumstances: "We do not believe that consumers desirous of hearing a romantic and nostalgic ballad such as the composer's song would be satisfied to purchase the parody instead." *Fisher*, 794 F.2d at 438.

2 Live Crew's work is a true parody. It is an original musical work that incorporates portions of the ideas and expression of an identifiable, previously published work, altering or building on that previous work as a means of expressing criticism or comment. "Pretty Woman" thus is entitled to First Amendment protection under the fair use doctrine.

CONCLUSION

Adequate protection for parody must be premised on proper application of the fair use doctrine in light of the First Amendment. 2 Live Crew used copyrighted material to create a legitimate parody. Such a work is entitled to full First Amendment and fair use protection.

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